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No. 403

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WILLIAM ANDERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William Anderson, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in order to review its judgment affirming a judgment of the United States District Court for the Northern District of Illinois sentencing petitioner to be imprisoned for fifteen years.

OPINIONS BELOW

Trial in the District Court was by jury, which returned a general verdict of guilty.

The opinion of the court below is appended hereto as Appendix "A".

The judgment of the court below is appended hereto as Appendix "B".

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the judgment sought to be reviewed and the time of the entry is June 6, 1966.
2. Petition for rehearing was denied on June 30, 1966.
3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a jury returns inconsistent verdicts in federal narcotics prosecution, acquitting defendant on some counts and convicting him on others, is not the "just" disposition of the cause to vacate the judgments on all counts and remand them for a new trial?
2. Should *Dunn* v. *United States*, 284 U.S. 390 (1932), be overruled?

STATUTES INVOLVED

28 U.S.C. §2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand

the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE.

Basis For Federal Jurisdiction in Court of First Instance.

The trial court had jurisdiction under 21 U.S.C. §174 and 26 U.S.C. §4705(a).

FACTS

Petitioner William Anderson was convicted upon a jury verdict of guilty of the unlawful sale and facilitating the transportation and sale of heroin, a narcotic drug, on January 11, 1965, in violation of 26 U.S.C. §4705(a) and 21 U.S.C. §174, as charged in two counts of a four count indictment. Anderson was acquitted on the other two counts which charged similar offenses alleged to have occurred on December 17, 1964.

Federal Narcotics Agent Donald Tucker testified that, on December 17, 1964, he and an informant went to the Grand Prix Lounge in Chicago and saw William Anderson. A narcotics transaction was arranged. Later, the informant drove to meeting place, while Tucker lay on the floor in the rear of the car. Tucker saw Anderson give an aluminum foil package to the informant, and heard Anderson say "Tell your man he can cut it two and a half times." After Anderson walked away, the informant handed the package to Tucker. Subsequent chemical analysis revealed the contents of the package to be heroin, a narcotic drug.

Tucker further testified that on January 11, 1965, he and the informant again drove to the Grand Prix Lounge, and saw Anderson. Another narcotics transaction was

arranged. Later, the informant and Tucker drove to the meeting place. Tucker saw Anderson give a Chesterfield cigarette package containing three separate aluminum foil packages to the informant, who handed it to Tucker. Subsequent chemical analysis revealed the contents of the packages to be heroin, a narcotic drug.

Federal Narcotics Agent Charles E. Hill testified that he arrested Anderson at the latter's home February 1, 1965, at which time Anderson told him that he expected the Agents long before then. Later, during questioning at the Bureau of Narcotics, Anderson stated that he has sold narcotics only to a few select customers that he has known all his life.

Defendant Anderson testified that he did not sell narcotics to Tucker on the dates in question. He admitted that he was convicted by federal authorities for the sale of narcotics in 1958.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME

I.

THE RULE OF *Dunn* v. *United States*, 284 U.S. 390 (1932), IS BASED UPON AN OUTMODED CONCEPT OF THE JURY'S PROPER FUNCTION IN THE FEDERAL SYSTEM OF CRIMINAL JUSTICE, WHICH NO LONGER RETAINS VALIDITY.

An examination of the facts reveals the obvious inconsistency between the acquittal on the first alleged narcotics transaction and the conviction on the second. If the Federal Narcotics Agent's testimony were accepted as true, and believed, Anderson's denial of guilt was false, and he was proven guilty beyond a reasonable doubt on all four counts. On the other hand, if the jury believed Anderson's version and discredited that of the agent, then Anderson was not proven guilty on any counts. The jury should logically have either acquitted on all counts or convicted on all counts, but not compromised. It is not unlikely that the jury disbelieved the agent's version of the facts but, nevertheless, convicted Anderson on some counts primarily because of his prior narcotics involvement. The question arises as to the appropriate remedy for a compromise verdict in a federal criminal case.

In *Dunn* v. *United States*, 284 U.S. 390 (1932), petitioner sought to have his cake and eat it. He had been acquitted on two counts and convicted on one. Alleging inconsistency in the jury verdict, he sought, not a retrial on all counts, but a judgment of acquittal on the count under which he was convicted. The Supreme Court affirmed the

verdict of guilty, stating in broad terms, that consistency in jury verdicts in federal criminal cases is not required. To the extent that Dunn may have sought the wrong remedy, *i.e.*, complete exoneration rather than retrial, his case is distinguishable from the case at bar.

More importantly, however, the *Dunn* rule appears to be based upon an outmoded concept of the jury's proper function in the federal system of criminal justice, which no longer retains validity. By citing *Horning* v. *District of Columbia*, 254 U.S. 135 (1920), Mr. Justice Holmes reapproved the authority of a jury "to bring in a verdict in the teeth of both law and facts. *Id.*, at 138. It is surprising that so distinguished a jurist and scholar should, in the name of the nation's highest court, bestow its stamp of approval upon such an anarchistic doctrine. Moreover, it is extremely dubious whether juries today do, in fact, have the lawful authority to do anything but impartially apply the law—given them by the judge—to the facts. Surely, the oaths administered to judges, juries and attorneys to properly apply and uphold the law of the land militate against such a drastic action.

In *Everett* v. *United States*, 336 F. 2d 979 (D.C. Cir. 1965), it was held that the district judge did not abuse his discretion in refusing, prior to sentencing, to permit withdrawal of a plea of guilty to a charge as to which the defendant at a hearing on his motion to withdraw the plea candidly admitted in open court his guilt and all essential elements of the offense charged. The Court emphatically rejected the idea that an accused has an absolute right to a jury trial on some vague issue of "culpability", where he does not dispute the material facts under the law. "The defendant has an absolute right to a jury determination

upon all essential elements of the offense", *United States* v. *England,* 347 F. 2d 425, 430 (7th Cir. 1965), but no more. Factors in mitigation not rising to the status of duress or insanity are properly left for consideration by the sentencing body. The "arbital" function theory espoused by Circuit Judge Wright, based upon the famous Holmes remark, did not command acceptance by the majority in *Everett.* And the dissent readily conceded that just recently, the Supreme Court, in *Nagelberg* v. *United States,* 377 U.S. 266 (1964), had "applied the rule that while (the defendant) may properly withdraw a guilty plea prior to sentencing, there must be some good reason for allowing him to do so." 336 F. 2d at 985.

If judges are required to return verdicts in accord with the credible evidence, *United States* v. *Mayberry,* 274 F. 2d 899 (2d Cir. 1960), no self-respecting system of justice could require less of citizens who serve on juries. Defense counsel who would suggest otherwise might consider the possible relevancy of this ancient remark: "Another such victory and I am undone." *Beauharnais* v. *Illinois,* 343 U.S. 250, 275 (1952).

Tolerance of irrational acquittals eventually encourages irrational convictions. If jury lawlessness is officially condoned or sanctioned, what safeguard is there against findings of guilty against innocent persons, which are insulated from review by the established rule that questions of credibility are left to the trier of fact for resolution? Ordinarily, an appellate tribunal is unable to look behind a jury's verdict to ascertain which witnesses were credible, and which were not. Where, as here, however, an obvious compromise verdict is returned, it is apparent that the matter of credibility was not definitively resolved. Under these circumstances, and in view of the nature of the relief

sought by petitioner, the only just and balanced solution is to vacate both the judgments of acquittal as well as those of conviction, and to remand all four counts to the district court for a new trial.*

CONCLUSION.

The petition for a writ of certiorari should be granted in order to reconsider the validity of the outmoded rule that permits inconsistent verdicts of juries to stand.

Respectfully submitted,

STANLEY A. BASS
Attorney for Petitioner.

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* No question of double jeopardy is presented, *United States* v. *Mayberry*, 274 F. 2d 899, 904-905 (2d Cir. 1960) (separate opinion of Circuit Judge Friendly), particularly where petitioner Anderson *explicitly* requests that the verdicts of acquittal be vacated.

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1965 — APRIL SESSION, 1966

No. 15521
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM ANDERSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 6, 1966

Before CASTLE and SWYGERT, *Circuit Judges,* and GRANT, *District Judge.*

PER CURIAM. William Anderson, defendant-appellant, prosecutes this appeal from a judgment of conviction and sentence entered upon a jury verdict finding him guilty of the unlawful sale and the unlawful concealment etc., of a designated quantity of heroin, a narcotic drug, on January 11, 1965, in violation of 26 U.S.C.A. §4705(a) and 21 U.S. C.A. §174, as charged in two counts of a four count indictment. The defendant was acquitted on the other two counts which charged similar offenses alleged to have occurred on December 17, 1964. The defendant was sentenced to fifteen years imprisonment.

Defendant contends[1] that his acquittal on the alleged December 17, 1964 offenses is inconsistent with his conviction of the January 11, 1965 charges and requires vacation of the judgment on all counts and the remandment of the cause for a new trial. But defendant's premise that inconsistency exists is faulty. Separate offenses on different dates are involved. The fact that the jury acquitted the defendant of the charges involving the alleged December transaction cannot be construed as effectuating a determination of the facts adverse to the government regarding the January sale and concealment etc., of which he was convicted.

Moreover, inconsistency in a verdict on separate counts does not entitle a defendant to reversal or vacation of a judgment of conviction. *Dunn* v. *United States,* 284 U.S. 390, 393-394; *United States* v. *Russo,* 7 Cir., 335 F. 2d 299, 301; *United States* v. *Margoles,* 7 Cir, 294 F. 2d 371, 372-373.

The judgment order of conviction and sentence appealed from is affirmed.

AFFIRMED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[1] The defendant also contended that the government failed to prove that the substance involved was heroin. But this contention was not pursued on oral argument. The government had filed an additional appendix which reveals that defendant stipulated that a government chemist if called as a witness would testify that the government's exhibit, a brownish—light brown powder (the substance the evidence shows the defendant delivered to an informer-purchaser), was heroin.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60610

Monday, June 6, 1966

Before

Hon. Latham Castle, *Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Robert A. Grant, *District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. WILLIAM ANDERSON, *Defendant-Appellant.* No. 15521	Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was submitted to the Court with oral argument.

On consideration whereof, it is ordered and adjudged by this Court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 403

WILLIAM ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Northern District of Illinois of the sale of heroin on January 11, 1965, and was sentenced as a second offender to imprisonment for fifteen years. The court of appeals affirmed.

At trial, petitioner was acquitted on two counts based on a sale of heroin alleged to have occurred on December 17, 1964. On appeal, he argued for the first time (as he now urges in the petition for a

writ of certiorari) that both his conviction and acquittal should be set aside and a new trial granted on the ground that the verdict was inconsistent.

As to the alleged sale on December 17, 1964, on which petitioner was acquitted, the evidence showed that on that date Agent Tucker went with an informant to the Grand Prix Lounge in Chicago and arranged to purchase narcotics from petitioner. Tucker paid petitioner $135 in advance funds (R. 6, 11-12). At about 7:45 p.m., petitioner telephoned the informant to designate the meeting place as a parking lot at 3651 South Federal. The informant drove there, with Tucker lying on the floor in the back of the informant's car. Petitioner walked over from his car and handed the informant an aluminum foil package. Petitioner was heard to say, "Tell your man he can cut it two and a half times." (R. 7, 12). After petitioner left, the informant gave Tucker the package, which was tested and found to contain narcotics (R. 8, 12).

With respect to the sale on January 11 (of which petitioner was convicted) the evidence showed that Agent Tucker and the informant again arranged a purchase at the Grand Prix Lounge. In accordance with petitioner's instructions, Tucker gave the informant $425 which the informant handed to petitioner in his car (R. 9, 13). The parties then drove to the parking lot at 3651 South Federal. Petitioner walked to the passenger side of the car Tucker was driving and handed a cigarette package to the informant, who handed it to Tucker (R. 9-10,

13). The package was later tested and found to contain narcotics (R. 10, 14-15).

Petitioner argues that, since the same agent testified to both sales and petitioner denied making both sales, the jury should logically have convicted or acquitted on all counts. He asks this Court to overrule the principle (enunciated in *Dunn* v. *United States*, 284 U.S. 390, and reaffirmed in *United States* v. *Dotterweich*, 320 U.S. 277) that consistency in a verdict is not required. There is no reason, we submit, for the Court to reconsider that settled principle in this case. The function of a jury in criminal cases is the same today as when those decisions were rendered.

Moreover, there is no necessary inconsistency in the conviction based on the sale in January and the acquittal as to the separate sale alleged to have occurred three weeks before. As set forth above, the evidence as to the January sale was more direct than that as to the December sale; in January, Tucker was in the driver's seat of the car when petitioner handed the heroin to the informant; in December, Tucker was lying on the floor of the car and did not receive the package until after petitioner had walked away. Even if it were to be presumed that absolute inconsistency in a verdict would not be accepted, there would be no sound reason to adopt a rule which would require an appellate court to do what petitioner seeks —*i.e.*, examine the underlying evidence to decide whether it can reconcile the jury's determination as to separate charges on the basis of the detailed evidence as to each crime.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

August 1966.

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